IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MERESTONE CONSULTANTS, INC., a Delaware Corporation,	)	
Plaintiff,	)	C.A. No. 2008-06-055
v.	)	Arbitration Case
RALPH CAHALL & SON PAVING, INC., a Delaware Corporation,	)	
Defendant.	)	

Submitted: May 29, 2009
Decided: August 13, 2009

Justin P. Callaway, Esquire
Tighe & Cottrell, P.A.
One Customs House
704 King Street, Suite 500
P.O. Box 1031
Wilmington, DE 19899
Attorney for Plaintiff

James S. Green, Esquire
Seitz, Van Ogtrop & Green, P.A.
222 Delaware Avenue, Suite 1500
P.O. Box 68
Wilmington, DE 19899
Attorney for Defendant

ORDER
ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Merestone Consultants, Inc. (hereinafter "Merestone") brings this motion for summary judgment, pursuant to *Court of Common Pleas Civil Rule 56*, seeking judgment against Defendant Ralph Cahall & Son Paving, Inc. (hereinafter "Cahall") for breach of contract. Merestone also requests court costs, attorney's fees and interest. Cahall argues summary judgment is inappropriate because there exist genuine issues of material fact and Merestone is not entitled to judgment as a matter

of law. Cahill relies in part upon its counterclaim for breach of contract and breach of warranty alleging improper workmanship and failure to exercise due care in performances of the work by Merestone. A hearing was conducted on May 29, 2009, and the Court reserved decision to consider the parties' arguments.

FACTS

Cahall, a general contractor, was hired by Robino Companies to provide site work at Walls Creek and Fairway Oaks housing development's properties. Cahall thereafter entered into contracts with Merestone to provide construction layout services. The facts indicate Merestone entered into a written contract with Cahall on January 6, 2005, to provide construction layout services for the Woods at Walls Creek Project and on January 11, 2005 to provide the same services for the Fairway Oaks Project.

Merestone submitted invoices to Cahall on September 27, 2005 and October 25, 2005, for work completed at the Woods at Walls Creek. Merestone also submitted to Cahall invoices on July 28, 2005 and November 29, 2005, respectively, for work completed at Fairway Oaks. Merestone alleges Cahall failed to make payments for the work completed on the projects as required under the contractual agreements.

ARGUMENT

Plaintiff, Merestone moves this Court for an order granting summary judgment pursuant to, *6 Del. C.* §3501 *et seq.* Merestone contends Cahall received payment for the work completed at the Woods at Walls Creek and Fairway Oaks and

failed to pay Merestone as required by 6 *Del. C.* §3501(2). Merestone argues that the language of this section which defines a "Contractor" to include:

> An architect, engineer, real estate broker or agent, subcontractor or other person, who enters into any contract with another person to furnish labor and/or materials in connection with the erection, construction, completion, alteration or repair of any building or for additions to a building, by such contractor.

And, 6 *Del. C.* §3501(6) defines a "Subcontractor" as:

> a person who enters into a contract to furnish labor and/or materials to a contractor; requires payment when Cahall received payment from Robino.

Merestone argues Cahall was hired by the owner of the properties to provide construction services, thus it is a contractor under the language of 6 *Del. C.* §3501(2). Additionally, Merestone argues when he was hired by Cahall to complete construction layout services for the Woods at Walls Creek and Fairway Oaks, it became a subcontractor to Cahall as defined by *6 Del. C.* §3501(6).

Merestone therefore alleges that Robino paid Cahall for the work performed and Cahall's failure to pay his invoices violated the provisions of 6 *Del. Code* §3503; "Use or Application of Money Received by Contractor," which provides:

> No contractor, or agent of a contractor, shall pay out, use or appropriate any monies or funds described in § 3502 of this title until they have first been applied to the payment of the full amount of all monies due and owing by the contractor to all persons (including surveyors and engineers) furnishing labor or material (including fuel) for the erection, construction, completion, alteration or repair of, or for additions to, such building, whether or not the labor or material entered into or became a component part of any such building or addition and whether or not the same were furnished on the credit of

> such building or addition or on the credit of such contractor.

Merestone further argues that it submitted invoices for the work performed in a timely manner and at no time did Cahall object to said invoices. In fact, Merestone argues the President of Cahall in a letter dated February 27, 2007 stated he would pay for the work performed. Finally, Merestone argues the contract terms provide, "invoice would be considered correct and owing unless objected to in writing within ten (10) days of submittal." Cahall did not object to the invoice within the ten (10) day period; therefore, Merestone maintains it is entitled to the amounts submitted in the invoices.

Cahall argues in response, that Merestone improperly performed the work under the agreement and as a result, the property owner, Robino refused to pay Cahall for the work performed by Merestone. Cahall further argues that Section 10(b) of Merestone's Form Agreement serves as a default admission that invoices would be correct and owing, in other words, the work was completed and billed accordingly, unless objected to within ten days. Cahall maintains that this default admission should not be read to constitute that the work was properly performed. Cahall argues Merestone's negligent performance of the work could not be determined until much later, which justified its failure to object within the ten (10) day period.

Cahall argues it was not paid by the property owner, Robino, because the construction layout services were not performed improperly, which caused Cahall to correct the work at great expense. Thus, as a result of Merestone's failure, it had to

bring an action against Robino for payment of the work performed at the Woods at Walls Creek and Fairway Oaks, which Cahall settled for an amount less than provided under the contract.

Cahall admits that Merestone was informed by its president that it would be paid for the work, but this was before the alleged improper performance was discovered. When Cahall learned the work was done improperly, this led to withholding payment.

ANALYSIS

In order to prevail on a motion for summary judgment, the moving party must show there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Browning-Ferris, Inc. v. Rockford Enterprises, Inc.* 642 A.2d 820, 823 (Del. Super. 1993). In reviewing the record, the Court must analyze all facts and reasonable inferences therefrom in the light most favorable to the non-moving party. *Stein v. Griffith,* 2002 WL 32072578 at 1 (Del. Com. Pl., Dec. 12, 2002).

Neither Merestone nor Cahall directs the Court to a Delaware case on point which has considered motion for summary judgment where counterclaims were brought by the opposing party. This matter has been considered, however, by other jurisdictions which are instructive.

In *Glen Park Terrace # 1 Homeowners Association v. M. Timm Inc.,* the Supreme Court of Nebraska held that:

> the presence of a justifiable counterclaim, presenting genuine issues of fact, which is in excess of the amount sought in the petition, and arising out of the transaction

> or occurrence which is the subject matter of a plaintiff's claim, is a bar to the granting of summary judgment.

Glen Park Terrace # 1 Homeowners Association v. M. Timm Inc., 230 Neb. 48, 52, 430 N.W.2d 40, 43 (1988). *E.g., Kirkpatrick v. 1st State Bank of DeQueen,* 265 Ark. 285, 578 S.W.2d 28 (1979); *Tipton v. Harden,* 128 Ga.App. 517, 197 S.E.2d 746 (1973); *Parmelee v. Chicago Eye Shield Co.,* 157 F.2d 582 (8th Cir. 1946).

In *Timm*, Plaintiff Homeowners Association brought an action against Defendant for non-payment of the pro rata share of common expenses for seven pieces of property owned by Timm in the condominium community. Plaintiff sought $8,956.90 in expenses owed by Timm. *Id* at 48-9. Defendant Timm, the developer of the seven properties, brought an affirmative defense on the basis the master deed and declaration did not allow for assessments prior to sale. *Id.* at 49. The units, at that time, had not been sold. *Id.* Defendant also brought a counter-claim in the amount of $36,346.00 alleging he had previously paid certain costs and expenses related to the common areas. *Id.* Plaintiff filed a motion for summary judgment that was granted by the trial court in the amount of $17,285.01. *Id.* at 51. The trial court denied defendant's motion for continuance and scheduled his counterclaim for trial.

Defendant appealed to the Supreme Court of Nebraska and Plaintiff brought a cross-appeal. *Id.* Defendant on appeal alleged that the trial court erred in granting Plaintiff's motion for summary judgment. *Id.* at 52. Plaintiff in the cross-appeal asserted the trial court erred in not dismissing Defendant's counterclaim and in setting it for trial. *Id.* The Supreme Court reversed the grant of summary judgment and held it was error for the trial court to grant a motion for summary judgment

while a counterclaim was pending related to the same subject matter. *Id.* The Court determined that both Plaintiff's and Defendant's claims arose out of the rights of each party under the master deed and declaration for the condominium community, thus there were genuine issues of fact rendering summary judgment inappropriate. *Id.*

The *Utah Court of Appeals* outlined a general rule regarding counterclaims when considering a motion for summary judgment in *Hendricks v. Interstate Homes, Inc.* 745 P.2d 475, 478 (Ut. Ct. App. 1987), where it stated:

> It is a general rule that the presence of a counterclaim which is shown to be sham, frivolous, or without merit is not in itself a bar to relief under summary judgment statutes and rules. On the other hand, the presence of a counterclaim predicated upon a good and substantial cause justifying a trial may bar a plaintiff's motion for summary judgment on his complaint or may preclude the court from ordering execution of the judgment pending the determination of the counterclaim. As a general thing, a claim predicated upon a good and substantial cause justifying trial is an insuperable objection to summary judgment where it is in excess of the amount demanded in the complaint…

Id. citing 73 Am.Jur.2d *Summary Judgment* § 31 (1974). *See also Kirkpatrick v. First State Bank of DeQueen,* 265 Ark. 285, 578 S.W.2d 28, 29-30 (1979); *Ivey Contracting Co. v. Elliott,* 151 Ga.App. 361, 259 S.E.2d 658, 661 (1979); *Galaxy Int'l, Inc. v. Magnum-Royal Publications,* 54 A.D.2d 875, 388 N.Y.S. 2d 583, 584 (1976); *Chisholm Ryder Co. v. Munro Games, Inc.,* 58 A.D.2d 972, 397 N.Y.S.2d 253, 254 (1970); *Bennion v. Amoss,* 28 Utah 2d 216, 500 P.2d 512, 516 (1972).

The facts here indicate Merestone's claim and the claim of Cahall arises out of the same set of transactions and involve the issues of performance and payment. Cahall does not dispute the price of the services provided, that a valid contract for services was executed with Merestone, that Merestone performed under the contract, and that Cahall never remitted payment. The dispute raised by the counterclaim is whether the work was properly performed. Because proper performance is a pre-condition to payment, this dispute raises an issue of material fact.

Like the Defendant in *Timm*, the amount sought in the counterclaim by Cahall exceeds the amount of Plaintiff's demand. Further, Cahall's counterclaim arises out of the same set of transactions upon which Merestone claim is premised and this raises genuine issues of fact. Because there are issues of material fact whether the work by Merestone was performed in an improper manner, the motion for summary judgment is not appropriate at this stage of the proceeding.

For the foregoing reasons, Plaintiff's motion for summary judgment, court cost, and attorney fees are hereby DENIED.

SO ORDERED this 13th day of August, 2009

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Alex J. Smalls
Chief Judge

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